UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

ELVIS PENA, on behalf of himself and others similarly situated,

Plaintiff,

-against-

LE CIRQUE, INC. and MARCO MACCIONI,

Defendants.

14 Civ. 7541 (FM)

DECLARATION OF JOSEF NUSSBAUM

I, Josef Nussbaum, under penalty of perjury, affirm as follows:

1. My name is Josef Nussbaum, and I am an associate with Joseph & Kirschenbaum LLP ("JK"), Plaintiffs' counsel in the above-captioned matter. I am familiar with the facts and circumstances set forth herein.

2. I submit this declaration in support of Plaintiff's motion for preliminary approval of class action settlement.

NATURE OF THE CLAIMS AND PROCEDURAL HISTOY

3. Plaintiff's motion seeks preliminary approval of a settlement that will resolve all claims asserted in the instant action.

4. Plaintiff filed the instant action on September 17, 2014 on behalf of himself and all other non-exempt tipped employees employed by Defendants at Le Cirque Restaurant within the relevant statute of limitations periods.

5. Plaintiff asserted, *inter alia*, that Defendants (1) unlawfully retained a portion of food service employees' tips in violation of New York Labor Law ("NYLL") § 196-d ("§ 196-d"); (2) improperly paid service employees pursuant to a tip credit in violation of the Fair Labor

Standards Act ("FLSA") and NYLL; and (3) failed to provide Plaintiffs with the appropriate wage notices required under NYLL §§ 195, 198.

6. Specifically, Plaintiff alleges that Defendants illegally misappropriated tips by requiring him and other food service employees to share their tips with captains. Plaintiff maintained that the captains exercised meaningful authority over the food service employees and that this rendered the captains tip-ineligible under NYLL § 196-d. As a result of this violation of § 196-d, Plaintiff also maintained that Defendants were ineligible to apply the FLSA and NYLL tip credit to food service employees' hourly wages because Defendants failed to meet the statutory notice prerequisites, which must be followed in order to implement a tip credit. 29 U.S.C. § 203(m); 12 New York Codes Rules and Regulations § 137-2.2 (repealed January 1, 2011); 12, § 146-1.3 (effective January 1, 2011) Defendants deny all of Plaintiff's allegations and maintain that their compensation practices were lawful.

7. Since the time the Complaint was filed, twelve (12) individuals opted-in as plaintiffs in this lawsuit (hereinafter together with Plaintiff Pena "Plaintiffs")

DISCOVERY

8. At the Fed. R. Civ. P. 16 Initial Conference before District Judge Edgardo Ramos the Parties agreed appear for a Settlement Conference before litigating the case. In anticipation of the Settlement Conference, the Parties agreed to exchange limited discovery to assist them in developing their claims and defenses. As part of the informal discovery process, Defendants produced hundreds of documents, including all Plaintiffs' timekeeping records, paycheck records and employee files. Defendants also produced records of the total amounts of tips paid to captains during the six years prior to the filing of the Complaint (the "Liability Period"). Plaintiffs produced all payroll records and communications relating to Le Cirque that they had in

their possession. Throughout the sample discovery period, Defendants' counsel engaged Plaintiffs' counsel in telephonic and email conversations to help Plaintiffs' counsel arrive at complete and proper understanding of Defendants' payroll records.

9. After thoroughly scrutinizing the sample records, Plaintiffs were able to estimate the total potential damages in this case and evaluate the strengths and weaknesses of their claims.

SETTLEMENT

10. The Parties first attempted to resolve this matter on behalf of the Opt-in Plaintiffs at a settlement conference before the Court on February 20, 2013. The Parties participated in a two-and-a-half hour Conference and, after hard fought negotiations, were not able reach a settlement.

11. At the conclusion of the Conference, the Court Ordered the Parties to continue to litigate the case by taking sample depositions and to appear for a second Settlement Conference on March 30, 2015. Specifically, the Court Ordered Plaintiffs to take the Fed. R. Civ. P. 30(b)(6) deposition of the corporate Defendant. The Court also Ordered Defendants to take the depositions of three of the Opt-in Plaintiffs.

12. After taking the depositions, the Parties reconvened for a second Settlement Conference before the Court on March 30, 2015. After approximately three and a half hours of hard fought negotiations, the Parties remained at an impasse. Toward the conclusion of the Conference, Defendants indicated they were more inclined to negotiate for a settlement on behalf of the class rather than only on behalf of the Opt-in Plaintiffs.

MEDIATION

13. After the second Settlement Conference, the Parties agreed to attend a mediation session to continue exploring the possibility of settling the lawsuit. In furtherance of class-wide

settlement discussions, Defendants produced payroll records for all putative class members, which included the total amounts of tips they earned during the Liability Period. After scrutinizing these records, together with the records Defendants had previously produced, Plaintiffs' Counsel was able to estimate the total potential class-wide damages in this case.

14. The Parties hired Ms. Ruth Raisfeld, Esq., a well-known and well-respected mediator, and participated in a thirteen and half hour mediation on May 27, 2015. In addition to the attendance of counsel for Plaintiffs and Defendants, the Named Plaintiff, six Opt-in Plaintiffs and the individual Defendant also attended the mediation. At the conclusion of the mediation, the Parties agreed to settle the case.

15. Over the next several weeks, the Parties engaged in negotiations over certain terms of the agreement, such as the precise formula to be implemented in distributing the settlement proceeds. The Parties finally arrived at a consensus on all the terms of the agreement in July 2015 and fully executed the settlement agreement and release on August 21, 2015.

TERMS OF THE SETTLEMENT

16. The Settlement Agreement provides that Defendants shall pay a maximum settlement amount of One Million One Hundred Thousand Dollars ($1,100,000.00) (the "Settlement Payment"). (Ex. A §§ 1.28, 3.1(A).) The Settlement Payment includes awards to Class Members, a service award to the Named Plaintiff, attorneys' fees and costs, and reasonable Claims Administrator's fees.

17. The Parties have designated Rust Consulting as the proposed Settlement Claims Administrator. (*Id.* at § 1.27) The Settlement Claims Administrator's reasonable fees and costs will be paid from the Settlement Payment. (*Id.*) The claims administrator estimates that their costs will not exceed $10,000.

CERTIFICATION OF CLASS

18. The proposed Class has at least 75 members.

19. Plaintiff Elvis Pena has no known conflicts with any Class Members. Mr. Pena is an adequate representative of the proposed class, has fairly and adequately represented and protected the interests of all Class Members, and has worked hard in achieving this settlement.

20. JK has done substantial work identifying, investigating, prosecuting, and settling the Class's claims. JK engaged in discovery and successfully negotiated a settlement.

21. JK is a law firm dealing almost exclusively with employee rights. Specifically, the firm represents employees in wage/hour and employment discrimination matters.

22. Over the last several years, JK's wage and hour practice has filed over 50 class/collective actions on behalf of people employed in the New York food service industry, in addition to a significant number of individual actions.

23. JK has been appointed lead or co-lead class counsel (or counsel for representative plaintiffs in FLSA collective actions) in actions in federal and state courts. *E.g.*, *Shahriar v. Smith & Wollensky Rest. Group*, 659 F.3d 234 (2d Cir. 2011) (affirming district court's certification of Rule 23 class of restaurant servers with JK as class counsel); *In re Milos Litig.*, No. 08 Civ. 6666, 2011 U.S. Dist. LEXIS 138473 (S.D.N.Y. Sept. 8, 2011) (granting final approval of settlement in wage and hour class action brought against a restaurant where JK was co-class counsel); *Kato v. Masa NY*, Index No. 09-104578 (S. Ct., N.Y. County Jan. 28, 2010) (certifying class and appointing JK class counsel); *Delaney v. Geisha NYC, LLC*, 261 F.R.D. 55 (S.D.N.Y. 2009) (conditionally certifying FLSA collective action); *Agofonova v. Nobu Corp.*, No. 07 Civ. 6926 (S.D.N.Y. Feb. 6, 2009) (granting final approval of settlement and certification of settlement class in wage and hour class action); *Williams v. Twenty Ones, Inc.*, No. 07-Civ-

3978, 2008 WL 2690734 (S.D.N.Y. June 30, 2008) (conditionally certifying FLSA collective action); *Fasanelli v. Heartland Brewery, Inc.*, 516 F. Supp. 2d 317 (S.D.N.Y. Oct. 5, 2007) (conditionally certifying FLSA collective action).

24. As a result of these lawsuits, we have recovered over $40 million for thousands of New York food service workers. Some of these settlements are pending preliminary or final approval. *E.g.*, *Capsolas v. Pasta Resources, Inc.*, No. 10 Civ. 5595, 2012 U.S. Dist. LEXIS 144651 (S.D.N.Y. Oct. 5, 2012) (granting final approval of $5,250,000 settlement); *Spicer v. Pier Sixty LLC*, No. 08 Civ. 10240, 2012 U.S. Dist. LEXIS 137409 (S.D.N.Y. Sept. 14, 2012) (granting final approval of $8,500,000 settlement); *Alderman v. 21 Club Inc.*, No. 09 Civ. 2418 (S.D.N.Y. Jan. 27, 2012) (granting final approval of $2,000,000 settlement); *In re Milos Litig.*, No. 08 Civ. 6666, 2011 U.S. Dist. LEXIS 138473 (S.D.N.Y. Sept. 8, 2011) (granting final approval of $1,975,000 settlement); *Ahad v. BLT Steak LLC*, No. 08 Civ. 5528 (S.D.N.Y. Aug. 13, 2010) (approving $925,000 settlement); *Bricker v. Planet Hollywood N.Y., L.P.*, No. 08 Civ. 443, 2009 U.S. Dist. LEXIS 76613 (S.D.N.Y. Aug. 13, 2009) (granting final approval of $900,000 settlement); *Agofonova v. Nobu Corp.*, No. 07 Civ. 6926 (S.D.N.Y. Feb. 6, 2009) (granting final approval of $2,500,000 settlement). In addition, we have increased awareness of wage and hour laws throughout the New York City restaurant industry. Our work has attracted significant media attention and contributed greatly to a city-wide movement on behalf of food service employees.

EXHIBITS

25. Attached hereto as Exhibit A is a true and correct copy of the Settlement Agreement and Release.

26. Attached hereto as Exhibit B is a true and correct copy of the proposed Class Notice.

27. Attached hereto as Exhibit C is a proposed order.

Dated: New York, New York
August 24, 2015

/s/ Josef Nussbaum/
Josef Nussbaum